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In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE E. HOUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner, Peerless Insurance Co., a surety, contends that a magistrate's relaxation of travel restrictions in a defendant's bond without notice to the surety constituted a unilateral material modification of the bond, thereby relieving the surety of any contractual liability following a forfeiture.

On October 7, 1975, George E. Hough, a nominal petitioner in this case, pleaded guilty to attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 12 years' imprisonment to be followed by 12 years' special parole. The court of appeals affirmed on October 19, 1977 (Pet. 4; Pet. App. 1a).

The evidence, as set forth in the district court's memorandum opinion denying the motion of petitioner Peerless Insurance Company to set aside forfeiture of

bail, and the district court's order denying Peerless' motion for reconsideration, shows that after petitioner Hough's conviction, he was allowed to remain free on bond pending appeal. The bond was executed on May 27, 1976, in the amount of $50,000, and it was signed by Victor Apodaca, Jr., as agent for Peerless. It contained a provision that "the [d]efendant is not to depart the Western District of Texas * * * except in accordance with such orders or warrants as may be issued by the [m]agistrate * * *"; it also specifically provided that "[d]efendant will not be permitted to leave El Paso County, Texas" (Pet. App. 1a-4a).

Subsequent to the execution of the appearance bond, Hough filed a motion to amend the provisions of his bond to allow him to travel to Ohio, Indiana, and Brownsville, Texas (*id.* at 2a-3a). On June 24, 1976, the United States Magistrate entered an order permitting Hough's bond to be amended as requested (*id.* at 3a). No notice of this change was given to Apodaca; however, he had numerous contacts with Hough and his counsel after the amendment of the bond (*id.* at 9a).

Following the affirmance of his underlying conviction, Hough failed to surrender himself on December 20, 1977, as ordered by the mandate of the Fifth Circuit Court of Appeals (Pet. 3; Pet. App. 1a). Thereafter, on January 3, 1978, the government filed a motion for judgment on forfeiture of bail, based upon Hough's failure to surrender himself (Pet. App. 1a). The district court entered a declaration of forfeiture of bail on January 21, 1978, finding Hough to be in default and his bond to be forfeited (*id.* at 2a). On February 10, 1978, Peerless, as surety, filed a motion to set aside forfeiture of bail, pursuant to Rule 46 of the Federal Rules of Criminal Procedure. The district court denied Peerless's motion (*id.* at 1a-7a) and,

following an evidentiary hearing, denied Peerless's subsequent motion to reconsider (*id.* at 8a-9a). The court of appeals affirmed (*id.* at 10a-11a).

1. Peerless contends (Pet. 9-13) that the magistrate's enlargement of the travel restrictions of Hough's bond to allow him to leave El Paso County in the Western District of Texas without notice to Peerless constituted a unilateral material modification of the bond and that therefore Peerless was relieved of any contractual liability for a forfeiture.

The argument falls with its premise. The bond expressly provided that "the [d]efendant is not to depart the Western District of Texas * * * except in accordance with such orders or warrants as may be issued by the Magistrate or the United States District Court for the Western District of Texas * * *" (Pet. App. 4a), and Peerless does not contend that the bond expressly provided for notice to it of any such orders. Because the bond expressly empowered the court or a magistrate to modify travel restrictions, Peerless, as the district court observed, could be expected to " 'anticipate the enlargement of travel restrictions in accordance with the terms of the bond' " (*id.* at. 5a, quoting *Stuyvesant Insurance Co.* v. *United States,* 410 F. 2d 524, 526 (8th Cir. 1969)). See also *United States* v. *Caro,* 56 F.R.D. 16, 18-19 (S.D. Fla. 1972). In the absence of a contractual entitlement to notice of motions or orders respecting Hough's bond, Peerless was properly deemed responsible for keeping itself posted on such matters. Pet. App. 5a; *Stuyvesant Insurance Co.* v. *United States, supra,* 410 F. 2d at 526-527. Accord, *United States* v. *Caro, supra.* Since, as noted above, the Peerless agent had numerous contacts with Hough and his counsel after the travel restrictions had been modified, he had ample opportunity to learn of the modification.

2. Peerless also contends (Pet. 7-8) that the courts below erred in applying federal law rather than state law in determining its rights under the bail bond and that certiorari is warranted to permit this Court to resolve a conflict in the circuits on the choice-of-law question. As evidence of the conflict, Peerless cites (*id.* at 8) cases from two circuits declaring that state law governs questions of bail bond contract interpretation, and cases from two other circuits holding that federal law applies. It is not clear, however, that these cases represent a conflict likely to persist in the absence of resolution of the issue by this Court or one that has produced intolerable results. In any event, it is unlikely that the conflict could be resolved in this case.

The most recent cases on this issue have held that federal law governs the interpretation of bail bond contracts. *United States* v. *Catino*, 562 F. 2d 1, 2-3 (2d Cir. 1977); *United States* v. *Miller*, 539 F. 2d 445, 447-448 (5th Cir. 1976). Of the two cases cited by Peerless as holding state law applicable, one has been characterized by a subsequent decision in the same circuit as representing dictum rather than a holding on the choice-of-law question (see *United States* v. *Vera-Estrada*, 577 F. 2d 598, 599 (9th Cir. 1978), discussing *United States* v. *Gonware*, 415 F. 2d 82, 83 (9th Cir. 1969)).[1] The other, *United States* v. *D'Anna*, 487 F. 2d 899, 900 (6th Cir. 1973), relies, without analysis, upon cases that decided the issue under former 18 U.S.C. 591 (repealed 62 Stat. 862), which contained language suggesting that state law governed questions concerning bail.[2] Such matters are now governed by the Bail

[1]The *Vera-Estrada* court, however, found it unnecessary to decide the question. The issue has also expressly been left open by the Tenth Circuit. See *United States* v. *Marquez*, 564 F. 2d 379, 380 (1977).

[2]See *Heine* v. *United States*, 135 F. 2d 914 (6th Cir. 1943); and *Palermo* v. *United States*, 61 F. 2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600 (1933). A third case relied on by the Sixth

Reform Act of 1966, 18 U.S.C. 3141 *et seq.*, Fed. R. Crim. P. 46(e)-(f), and 18 U.S.C. 3041, none of which contains such language. See *United States* v. *Miller*, *supra*, 539 F. 2d at 447 n.2. It is entirely possible that the Sixth Circuit would follow the recent decisions in *Miller*, *supra*, and *Catino*, *supra*, were the issue now presented to it.[3] Even assuming the Sixth Circuit adheres to its rule, however, Peerless has not adequately explained the practical necessity for resolving the conflict. Acceptance of the position urged by Peerless—that state law governs the interpretation of bail bond contracts respecting federal prisoners—would result in even less uniformity in the applicable law than is the case when at least two circuits are applying federal common law.

In any event the choice-of-law question is not presented in this case because Peerless has not shown that a different result would be dictated by Texas law. Peerless has cited three Texas cases for the proposition that "alteration of a bail bond contract void[s] it as against a non-consenting surety" (Pet. 8). None of the cited cases, however, involved a contract that expressly reserved the right of a court or magistrate to make changes in bond conditions; and one of the cases, to the extent it is relevant, tends to suggest that state law would lead to the result reached under federal law by the courts below. See *Gilford* v. *State*, 362 S.W. 2d

Circuit in *D'Anna*—*Swanson* v. *United States*, 224 F. 2d 795, 15 Alas. 608 (9th Cir. 1955)—was decided after the repeal of 18 U.S.C. 591, but the court there simply applied the territorial law of Alaska without discussion.

[3]It is similarly unclear whether the Eighth Circuit would continue to follow *Palermo* v. *United States*, *supra*, on this issue. The Eighth Circuit has not confronted the issue since the repeal of 18 U.S.C. 591 in 1948, although a recent district court decision in that circuit has accepted *Palermo* as controlling. *United States* v. *Wray*, 389 F. Supp. 1186, 1188 (W.D. Mo. 1975).

843, 844-845 (Tex. Cr. App. 1962) (where sureties admitted executing bonds with blank spaces for the insertion of certain information the "completion of the bail bonds by properly filling in such blank spaces with necessary and proper information is not an alteration of such bail bonds and the bonds are enforceable as so filled out").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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